

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 14, 2005 Session

JAY B. WELLS, SR., ET AL. v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission, Eastern Division
No. 20400450 Vance W. Cheek, Jr., Commissioner

No. E2004-02345-COA-R3-CV - FILED APRIL 28, 2005

This case is an outgrowth of separate litigation filed in federal court by the claimants here – Jay B. Wells, Sr., for himself and on behalf of others similarly situated – Knox County property owners and/or residents in a certain area of the county. In the federal court action, the claimants here sued a number of entities for damages allegedly caused by the disposal of toxic and hazardous waste on another’s property near that of their own. The defendants in the federal court case alleged that their actions were taken pursuant to the permission or advice of the Tennessee Department of Environment and Conservation (“the TDEC”), an agency of the State. The claimants subsequently filed this claim in the Claims Commission against the TDEC. The State responded with a motion to dismiss predicated on several grounds, including its contention that the Claims Commission lacks subject matter jurisdiction over the claim. The Claims Commissioner granted the motion. The claimants appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Dan C. Stanley, Knoxville, Tennessee, for the appellants, Jay B. Wells, Sr., and others similarly situated.

Paul G. Summers, Attorney General; Michael E. Moore, Solicitor General; Mary M. Bers, Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

I.

This action before the Claims Commission finds its genesis in an action filed by the claimants as plaintiffs in the United States District Court for the Eastern District of Tennessee. In

the federal court action, the plaintiffs sued the City of Knoxville (“the City”), Burnett Demolition & Salvage Co., Inc. (“Burnett”), S&ME, Inc. (“S&ME”), The Development Corporation of Knox County (“Development Corp.”), Barge, Waggoner, Sumner & Cannon, Inc. (“BWSC”), Phillip E. Reagan, and other entities identified in the complaint as “John Doe Corporation 1-100.” The claimants consist of a class of owners and/or residents of property situated near the property of Phillip Reagan. They allege that toxic and/or hazardous material was removed from property (“the Coster Shop”) owned by the City and dumped on Reagan’s property. Burnett, the demolition and salvage contractor hired by the City to remove the subject material, averred in its answer in federal court that “it acted in accordance with permission granted by the [TDEC] as communicated to it by co-defendant S&ME” Burnett pled the doctrine of modified comparative fault. Similarly, S&ME, the environmental consultant on the project, alleged in its answer that it

regularly sought and received the advice of the [TDEC] concerning the regulated status and disposition options available on the (Coster Shop) project. [S&ME] avers that advice concerning the disposition of concrete on the Coster Shop site came from an employee of TDEC.

Defendant BWSC, the engineering contractor hired to oversee the engineering aspects of the project, made similar allegations and also relied upon the doctrine of modified comparative fault.

The claimants subsequently filed this claim with the Division of Claims Administration. The claim was thereafter transferred to the Claims Commission. In the claim, the claimants stated that their cause of action arises out of

the dumping of toxic and/or hazardous waste on the Reagan property by entities that relied on the advice and counsel of employees or agents of the [TDEC], an agency of the State of Tennessee. Such dumping proximately caused and/or produced damaging contamination of property belonging to claimants of the Burnett Creek Area, and/or has caused severe diminution of value of claimants’ properties, with such contamination continuing to cause and produce personal injuries and/or property damage to each of the claimants named herein.

In bringing the instant claim, the claimants relied upon the provisions of Tenn. Code Ann. § 20-1-119 (Supp. 2004), and alleged the following causes of action and damages against the TDEC: negligence; negligence per se for the violation of four federal statutes and two state statutes; personal injuries; damage to real property and other property interests; nuisance; and trespass.

The State responded by filing a motion to dismiss. In its motion, the State argues that the Claims Commission lacks subject matter jurisdiction of the claim; that the allegations set forth in the claim fail to state a claim upon which relief can be granted; and that the claim is barred by the public duty doctrine. The claimants respond by stating that they “only brought action against [the

State] after multiple Defendants in the Circuit Court case¹ asserted in their answers that [the State] was responsible for the damages to these Claimants pursuant to Tenn. Code Ann. § 20-1-119.” The claimants also sought a stay to permit them to conduct discovery to determine whether a viable claim against the State existed. The State filed a response to the claimants’ request for a stay in which it stated that no amount of discovery would change the fact that the claim is barred by Tenn. Code Ann. § 9-8-307(a)(2) (Supp. 2004) since it is one involving the state’s “regulatory activities.”

The claimants later renewed their motion to stay, pointing out that, since the parties in the federal court case had agreed to limit discovery to facilitate mediation, they, the claimants, would not have an opportunity to obtain discovery as to the affirmative defenses raised by the federal court defendants unless the stay was granted.

The Claims Commissioner entered an order denying the claimants’ motion to stay and granting the State’s motion to dismiss. The latter ruling was based primarily upon the Commissioner’s determination that the Claims Commission lacks subject matter jurisdiction pursuant to Tenn. Code Ann. § 9-8-307(a)(1). The claimants appeal.

II.

When evaluating the merits of a motion to dismiss, a court must construe the claim liberally, presuming the factual allegations to be true and giving the claimants the benefit of all reasonable inferences. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). However, a motion to dismiss based on lack of subject matter jurisdiction pursuant to Tenn. R. Civ. P. 12.02(1) concerns “the nature of the cause of action and the relief sought.” *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000) (citations omitted). Subject matter jurisdiction “can only be conferred on a court by constitutional or legislative act.” *Id.* Since the issue of subject matter jurisdiction is a question of law, we review the trial court’s judgment *de novo* with no presumption of correctness as to the trial court’s conclusions of law. *Id.*

III.

We note at the outset that the claim attempts to recite its cause of action in a rather unorthodox manner. The claim does not seek to set forth specific facts to support the claimants’ allegations against the State; rather, they rely upon assertions by defendants in another lawsuit to the effect that the State has culpability in this matter. In effect, the claimants are saying that they can pursue a claim against the State because others, in related but different litigation, say the State gave its permission or rendered advice to the others with respect to their actions. Such allegations hardly satisfy the requirement of Tenn. R. Civ. P. 8.01 that a pleading “shall contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief.” (Emphasis added). Moving beyond this deficiency, we now turn to the merits of the State’s motion. We review that motion as

¹The federal court action was originally filed in the Circuit Court for Knox County. It was subsequently removed to federal court on May 27, 2003.

if the claim against the TDEC had set forth a factual predicate for its complaint against the State. In other words, we construe the claim in a light favorable to the claimants – as if they had set forth facts showing that the State, in its regulatory capacity, had erroneously given the federal court defendants bad advice or improper permission with respect to activities that damaged the claimants.

IV.

Since subject matter jurisdiction may only be conferred by constitutional or legislative act, *see Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989), we must address anew the application of Tenn. Code Ann. § 9-8-307 to the matter before us. The State is generally immune from suit except where it consents to be sued. *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000). Consequently, under Art. I, § 17 of the Tennessee Constitution, no suit against the state may be sustained absent express authorization from the legislature. *Crowe v. John W. Harton Mem. Hosp.*, 579 S.W.2d 888, 890 (Tenn. Ct. App. 1979). However, the state legislature has waived its sovereign immunity as to certain actions brought before the Tennessee Claims Commission. *See* Tenn. Code Ann. § 9-8-301, *et seq.* Tenn. Code Ann. § 9-8-307(a)(1) provides that “[t]he commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of ‘state employees,’” which fall within one of several categories. However, the statute further provides, in relevant part, as follows:

No item enumerated in this subsection (a) shall be interpreted to allow any claim against the state on account of the acts or omissions of persons, partnerships, corporations or other entities licensed or regulated by agencies of the state, notwithstanding any negligence committed by the state in the course of performing licensing or regulatory activities. No item enumerated in this subsection (a) shall be interpreted to allow any claims against the state arising out of or resulting from:

(A) The issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization . . . ;

(B) An inspection, or by reason of making an inadequate or negligent inspection of any property . . . ;

Tenn. Code Ann. § 9-8-307(a)(2). The Claims Commissioner relied upon the above statutory language when he held that since “the Claimants have sued the State relating to actions within the [TDEC’s] regulatory authority because of advice given to third-party entities and/or individuals,” the Claims Commission does not have subject matter jurisdiction over this claim.

The claimants challenge the judgment of the Claims Commission, but not its reasoning. Rather, they contend that they had no factual basis for alleging a cause of action against the State

other than the *allegations* of the defendants in the federal court case. They contend that, at the time the matter was dismissed, they had not had an opportunity to discover why such allegations were made. Consequently, the claimants argue that they should have been allowed to conduct discovery to ascertain the nature and extent of the State's advice and permission before the State's motion was considered by the Claims Commission. In support of this argument, they cite *Moore v. Bell*, 215 S.W.2d 787 (Tenn. 1948), for the proposition that a motion to dismiss must be construed against the movant, particularly where the movant is more familiar with the facts set forth in the claim.

We hold that the Claims Commission does not have jurisdiction to hear this matter. This court has previously held that the language of Tenn. Code Ann. § 9-8-307(a)(2) evidences the legislature's intent that "the State did not waive its immunity because of acts of licensees, even if the State were negligent in licensing, regulating or inspecting." *Combs v. State*, No. 02A01-9310-BC-00217, 1994 WL 592036, at *3 (Tenn. Ct. App. W.S., filed October 27, 1994). Consequently, we find that the claim was not proper where the TDEC was merely acting in its regulatory capacity. As the State noted in its brief, the claim averred that the defendants in the federal action attributed their actions to the advice and permission of the TDEC relative to the disposition of allegedly hazardous waste that was removed from the Coster Shop. The Tennessee Hazardous Waste Management Act, codified in Tenn. Code Ann. § 68-212-101, *et seq.*, authorizes the TDEC to promulgate regulations addressing, among other things, who is permitted to dispose of hazardous waste, how the waste should be disposed, and where commercial waste may be stored or treated once it is disposed. *See* Tenn. Code Ann. § 68-212-107(d) (2001). Since the alleged permission and advice extended to the federal court defendants relative to the disposal of these materials fall within the scope of the TDEC's regulatory duties, the agency is immune from suit. Additional discovery will not change the fact that, whatever the TDEC did, its actions were a part of its regulatory activities. Accordingly, we affirm the judgment of the Claims Commission. In view of our disposition of this appeal, we pretermitt all other issues raised by the parties.

V.

The judgment of the Claims Commission granting the State's motion to dismiss is affirmed. This case is remanded for collection of costs taxed below, pursuant to applicable law. Costs on appeal are taxed to the appellant, Jay B. Wells, Sr.

CHARLES D. SUSANO, JR., JUDGE